

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **AM2009-013**

Release Date: 10/23/2009

CC:INTL

FILEN-145359-09

UILC: 956.06-00

date: October 19, 2009

to: Nancy Johnson
Pre-filing and Technical Guidance
(Large and Mid-Size Business)

from: Steven A. Musher
Associate Chief Counsel
(International)

subject: Application of Notice 2008-91 to Section 956(a)(1)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

This memorandum addresses the application of Notice 2008-91, 2008-43 I.R.B., 1000, to certain obligations of related United States persons held by one or more controlled foreign corporations over the course of a taxable year, by summarizing the requirements that a controlled foreign corporation must meet to exclude such an obligation from the definition of the term "obligation" for purposes of section 956.

CONCLUSION

Notice 2008-91 may apply to exclude, from the definition of "obligation" under section 956, obligations of a related United States person held by one or more controlled foreign corporations provided that (1) the requirements of Notice 2008-91 are satisfied, (2) each controlled foreign corporation independently funds the obligation, and (3) the related United States person executes and repays each obligation owed to its controlled foreign corporation as a separate, independent transaction.

LAW AND ANALYSIS

Section 956(c)(1)(C), (c)(2)(F) and (c)(2)(L) defines “United States property” generally to include an obligation of a related United States person held by a controlled foreign corporation. For this purpose, a related United States person includes a United States shareholder of the controlled foreign corporation as defined in section 951(b), and, as provided in section 956(c)(2)(F), any domestic corporation whose voting stock is at least 25% owned, directly, indirectly or constructively, by the United States shareholder. Also included are obligations of a United States person held by a partnership, estate or trust in which the controlled foreign corporation or any related person (as defined in section 954(d)(3)) is a partner, beneficiary, or trustee immediately after the acquisition of the obligation by the controlled foreign corporation.

With certain exceptions, the term “obligation” is defined by Temp. Reg. § 1.956-2T(d)(2) to include any bond, note, debenture, certificate, bill receivable, account receivable, note receivable, open account or other indebtedness, whether or not issued at a discount and whether or not bearing interest.

Notice 2008-91 provides, in pertinent part, that for purposes of section 956, a controlled foreign corporation may choose to exclude from the definition of the term “obligation”, an obligation of a related United States person that is collected within 60 days from the time that it is incurred. This exclusion shall not apply, however, if the controlled foreign corporation holds for 180 or more calendar days during its taxable year obligations that, without regard to the 60 day rule described in the preceding sentence, would constitute an investment in United States property. Notice 2008-91 provides that the notice shall only apply for the first two taxable years of a foreign corporation ending after October 3, 2008. Notice 2009-10, 2009-5, I.R.B. 419, extends the application of Notice 2008-91 to the third consecutive taxable year of a foreign corporation, if any, (including any short taxable year) that ends after October 3, 2008, and that ends on or before December 31, 2009.

Accordingly, if an outstanding obligation of a related United States person held or deemed to be held at quarter-end by a controlled foreign corporation is collected within 60 days of issuance, and all such obligations of the tested controlled foreign corporation are not held for 180 or more calendar days during the taxable year, then the controlled foreign corporation may choose to exclude all such obligations as United States property. The following reviews the application of Notice 2008-91 to multiple obligations of a related United States person held by one or more controlled foreign corporations in light of certain judicial doctrines and the generally applicable requirements of the Treasury regulations that, depending on the facts of each case, may be relevant to the analysis whether an obligation is excluded under Notice 2008-91.

Each qualifying controlled foreign corporation may separately choose to apply Notice 2008-91 during an available taxable year.

If more than one controlled foreign corporation holds one or more obligations of a related United States person during the same taxable year, each controlled foreign corporation may separately qualify and choose to apply Notice 2008-91. The choice to apply or not to apply the notice for one eligible year does not affect a controlled foreign corporation's choice to apply the notice for another eligible year.

As noted above, one requirement of Notice 2008-91 is that each obligation of a related United States person must not remain outstanding for more than 60 days (excluding the date of issuance and including the date of repayment)¹ from the time it is incurred. In addition, the exclusion shall not apply if the controlled foreign corporation holds for 180 or more calendar days during its taxable year obligations that, without the 60 day rule, would constitute United States property. Because each controlled foreign corporation may meet the less than 180 day requirement with respect to obligations of related United States persons outstanding during different days of the taxable year, obligations of the same related United States person may qualify for the exclusion pursuant to Notice 2008-91 if they are held by more than one controlled foreign corporation and that, in the aggregate, remain outstanding for 180 or more days during the taxable year.

Should a controlled foreign corporation fail to meet the conditions of Notice 2008-91, an obligation of a related United States person will be considered United States property as of its origination date. Thus, for example, assuming a calendar year taxpayer, if an obligation of a related United States person held by a controlled foreign corporation originating December 31, 2008, remained outstanding for a period exceeding 60 days, then the obligation would constitute United States property under Treas. Reg. § 1.956-1(b) as of the determination date, December 31, 2008. Should the obligation be repaid before the subsequent determination date, March 31, 2009, the controlled foreign corporation could be eligible to apply Notice 2008-91 to exclude obligations originating in 2009 provided all relevant conditions are met for each such obligation. To determine if it met the 180 day rule for 2009, the controlled foreign corporation would need to include in its count the number of days that the obligation originating in 2008 remained outstanding during 2009.

Treas. Reg. § 1.956-1T(b)(4) must be taken into account.

At the discretion of the Commissioner a controlled foreign corporation will be considered to hold indirectly an obligation of a related United States person acquired by any other foreign corporation that is controlled by the controlled foreign corporation, if one of the principal purposes for creating, organizing or funding (through capital contributions or debt) the other foreign corporation holding such obligation is to avoid the application of section 956 with respect to the controlled foreign corporation. See Temp. Reg. § 1.956-1T(b)(4). This rule must be taken into account in applying Notice 2008-91.

¹ Note, however, that according to Treas. Reg. § 1.956-2(d)(1), a controlled foreign corporation is deemed to have acquired property as of the date it acquires an adjusted basis in the property, which in the case of an obligation would be the origination date.

Pledges or guarantees must be taken into account.

A controlled foreign corporation shall be considered as holding an obligation of a United States person if such controlled foreign corporation is a pledgor or guarantor of such obligation. In certain cases where the related United States person whose obligation is held by a controlled foreign corporation is financially impaired, the undertaking, expressed or implied, by another controlled foreign corporation may be treated as serving as a pledge or guarantee for the performance of such obligation. This may occur, for example, if a related United States person incurs obligations from multiple controlled foreign corporations, and repayment of one United States obligation within the 60 day period is contingent on a subsequent United States obligation to another controlled foreign corporation. See Treas. Reg. § 1.956-2(c)(1). Also, if the assets of a controlled foreign corporation serve at any time, even though indirectly, as security for the performance of a United States obligation of a related United States person, then the controlled foreign corporation will be considered a pledgor or guarantor of that obligation. See Treas. Reg. § 1.956-2(c)(2). However, the fact that a controlled foreign corporation is related to another controlled foreign corporation does not on its own create the presumption that a controlled foreign corporation pledges, guarantees or otherwise secures the performance of an obligation of a related United States person held by a related controlled foreign corporation.

The related United States person must execute and repay each obligation owed to its controlled foreign corporation as a separate, independent transaction.

Each obligation must not be executed as one in a series of related steps in a unified transaction. Jacobs Engineering Group, Inc. v. United States, 79 AFTR, 2d 97-1673. Should it be determined that a series of obligations constitute successive roll-overs of a single obligation, then the periods of disinvestment would be ignored for purposes of testing the 60 day and 180 day rules of Notice 2008-91.

To determine that an obligation is independent, the analysis must consider all relevant facts and circumstances at the time of each obligation's origination. These factors may include the volatility of economic conditions and the related United States person's access to commercial paper markets, and a reasonable evaluation of whether these conditions will persist during the term of the loan. This evaluation should assess the availability and terms of alternative sources of outside financing to the United States person, as well as account for the related United States person's financial capacity to repay each obligation independently. Finally, the analysis should evaluate, within the context of these facts, the controlled foreign corporation's period of disinvestment between holding obligations of the related United States person and conclude on the reasonableness of treating each obligation as an independent obligation. See Rev. Rul. 89-73, 1989-1 CB 258.